No. 80-1036

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In the Supreme Court of the United States
OCTOBER TERM, 1980

MACHINE TOOL AND GEAR, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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I.

RESPONDENT'S BRIEF IN OPPOSITION MUST BE STRICKEN FROM THE RECORD

Petitioner, Machine Tool and Gear, Inc. ("MTG") filed its "Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit" on December 29, 1980, and made timely service upon the National Labor Relations Board and the Solicitor General of the United States (collectively "Respondent") pursuant to Sup Ct Rules 22.3 and .4 respectively. Upon the request of the Respondent, the parties agreed and stipulated to extend the time for the Respondent's "Brief in Opposition" to and including March 4, 1981. This stipulation was accepted by the Clerk of the Supreme Court.

However, the filing deadline of March 4, 1981, passed without the filing of the "Brief In Opposition" with this Court as Respondent so stipulated and agreed. Moreover, Respondent never undertook its responsibility to notify MTG and the Clerk of the Supreme Court of the passing of time limit or the need for another extension of time. Instead, Respondent took it upon itself to ignore the Supreme Court's rules and set its own arbitrary timetable. The "Brief In Opposition" was not filed until March 18, 1981, 14 days late.

Respondent may believe that it can pick and choose which rules it wishes to follow, but such is not the case. Supreme Court Rule 22.1 requires that Respondent's "Brief In Opposition" must be filed with this Court within the time enlarged by the stipulation. Respondent's "Brief In Opposition" was filed late and therefore, not within the time permitted by the court rule. Supreme Court Rule 22.1 specifically speaks to this attempted late filing by Respondent, mandating that,

> "The clerk *shall not* accept a brief which does not comply with this Rule . . ." (emphasis added).

The Rule's operative words, "shall not" are mandatory commands which prohibit the late filing of Respondent's "Brief In Opposition". Since the "Brief In Opposition" was not filed in conformity with Sup Ct Rule 22.1, it must be stricken from the record before this Court.

II.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Three recent decisions from the Third and Fifth Circuit Courts of Appeals, reported in the two months since the filing of the Petition for a Writ of Certiorari, accentuate the need for immediate review and direction by the Supreme Court. These three opinions, *NLRB* v *K & K Gourmet Meats, Inc.*, ____ F2d ____, 106 LRRM 2448 (3rd Cir. 1981); *NLRB* v *Permanent Label Corporation*, ____ F2d ____, 106 LRRM 2211 (3rd Cir. 1981); and *NLRB* v *Dadco Fashions, Inc.*, ____ F2d ____, 106 LRRM 2022 (5th Cir. 1980) illustrate the confusion and conflict over this Court's pronouncements in *NLRB* v *Gissel Packing Company, Inc.*, 395 US 575 (1969). Moreover, *Dadco Fashions*, underscores the National Labor Relations Board's ("NLRB" or "Board") results-oriented approach to determining supervisory status.

A. Confusion Continues Over The Proper NLRB Analysis Necessary For Gissel Bargaining Orders

In *K & K Gourmet Meats*, *Permanent Label*, and *Dadco Fashions*, the Third and Fifth Circuits examined *Gissel* bargaining orders in which the Board merely rubber-stamped the *Gissel* remedy, without any analysis by the Board itself or its Administrative Law Judges ("ALJ"). These three decisions generated a total of seven written opinions on the perceived impact of and requirements for a valid *Gissel* bargaining order. The varied responses in the majority, concurring, and dissenting opinions vividly highlight the need for this Court's intervention and guidance.

In *K & K Gourmet*, the Third Circuit criticized the Board for indulging in "... the grossest kind of speculation ..." by arbitrarily implementing bargaining orders without properly

analyzing facts to determine whether a secret election was possible. *Id.* at 2455. Denying enforcement of the bargaining order, Judge Max Rosenn reminded the NLRB that,

> "The selection of an exclusive collective bargaining agent is not a game of chance but a matter of the highest importance to employees and employers alike. *Legislation and experience indicate that an employee's statutory right to select an exclusive bargaining agent should be determined by democratic process in a free and open election. The Board's responsibility for holding such election was not meant to be supplanted by the authority found to exist in Gissel.*" *Id.* at 2455 (emphasis added).

Rather than remanding the case to the NLRB for further analysis, the Court reviewed the facts and determined that a bargaining order was not necessary. *Id.* at 2455-2456.

This decision drew the ire of dissenting Judge John J. Gibbons who accused his brethren of intentionally attempting to sabotage *Gissel*, because they did not agree with it. According to Judge Gibbons, the Third Circuit is currently engaging in,

> "... *guerilla warfare against Gissel orders* ... [either] by insisting that the Board's opinion writing is so opaque that we cannot understand it and ... [or] ... the majority simply substitute[s] its fact finding for that of the Board." *Id.* at 2456 (citation omitted; emphasis added).

In *Permanent Label*, three separate opinions were filed on *Gissel* and its correct application. There, the Third Circuit affirmed the Board's finding of substantial and pervasive unfair labor practices, but again refused enforcement of a *Gissel* bargaining order because the NLRB had ignored the Court's request for a,

> " . . . statement of reasons leading it to impose a bargaining order. * * *
>
> *Rather, it relied on the ALJ's conclusory statement that 'these unfair labor practices cannot be corrected by conventional remedies, including a re-run election'.* * * *
>
> *We need more.*" *Permanent Label* at 2216 (footnote and citations omitted; emphasis added).

After denying enforcement, the Court remanded the case to the NLRB for more specific findings to support the Board's decision that a re-run election could not be held.

Concurring in the remand to avoid additional delays caused by the three separate opinions, Judge Leonard I. Garth would have preferred,

> " . . . *an outright denial of enforcement* so that a new election may be expedited, rather than a remand for a time-consuming, belated justification by the Board of its determination to impose a bargaining order. Remand not only presents a possibility that this Court will once again have to review this case, but of greater concern, additional delay will now occur during which the employees of *Permanent Label* will be unable to exercise their franchise in the selection of their representative, if indeed they desire one." *Id.* at 2217. (Citations and footnotes omitted; emphasis added).

Dissenting, Chief Judge Collins J. Seitz, would have enforced the order believing that the ALJ's listing of the unfair labor practices was sufficient to justify a bargaining order. *Id.* at 2222.

Permanent Label is also noteworthy because it distinguished *Kenworth Trucks of Philadelphia, Inc.* v *NLRB*, 580 F2d 55

(3rd Cir. 1978), cited at page 8 of our Petition. The Third Circuit concluded in *Kenworth* that the NLRB could delegate to an ALJ its responsibility to make specific findings regarding *Gissel* remedies if the Board expressly adopts the analysis and conclusions. *Permanent Label* at 2216, n. 12. As in the instant case, neither the NLRB nor the ALJ engaged in any analysis to support the bargaining order, thus requiring denial of its enforcement by the Third Circuit.

The Fifth Circuit has further compounded the conflict between the circuits and the NLRB by its decision in *Dadco Fashions*. In a complete about-face, the Fifth Circuit announced they will now enforce *Gissel* bargaining orders. The *Gissel* remedy previously denied enforcement under *NLRB* v *American Cable System, Inc.*, 427 F2d 446 (5th Cir. 1969), *cert. den.*, 400 US 957 (1970), because such bargaining orders contained only a " . . . litany, reciting conclusions by rote without factual explanation." *Id.* at 449. Complaining that the Fifth Circuit was ignoring the sound principles established in *American Cable*, dissenting Judge Thomas Gee was "unwilling to bow to the Board's apparent resolve to broaden the *Gissel* exception . . ." *Dadco Fashions*, at 2027.

Rather than providing answers, *K & K Gourmet Meats*, *Permanent Label*, and *Dadco Fashions*, increase the confusion concerning proper *Gissel* bargaining orders. The conflict and confusion over the proper interpretation of *Gissel* must be resolved because,

> "*Conscientious Board members reading our opinions from Armcore Industries in 1976 to Permanent Label in 1981 must be puzzled about what they should do in a Gissel bargaining order case to satisfy us.*" *K & K Gourmet*, at 2456 (Gibbons, J, dissenting). (emphasis added).

Judge Gibbons has truly identified the problem. However, this observation would have been even more accurate if Judge

Gibbons had further realized that beside the NLRB and the appellate courts, the labor bar is also confused as to the standard of review in *Gissel* cases. Guidance from this Court is not only helpful, but needed. It has been twelve years since *Gissel* and the t' ne is ripe for clarification.

B. NLRB Identification Of Supervisors Continues On A Result-Oriented Course

NLRB v *Dadco Fashions, Inc.*, ____ F2d ____, 106 LRRM 2022 (5th Cir. 1980) also underscores the NLRB's result-oriented approach to determining supervisory status, which was pointed out by Judge Van Graafieland in *NLRB* v *Porta Systems*, 625 F2d 399 (2nd Cir. 1980). See Petition at 14-15. In *Dadco Fashions*, certain employees were alleged to have committed unfair labor practices during an organizational drive, which the Board attributed to the employer by ruling *that the employees were supervisors*. As the Board opinion (243 NLRB No. 170, Slip. Op. at 4-5) and the Fifth Circuit opinion (106 LRRM at 2024) make clear, these individuals had *less* supervisory authority than Gregory Stone, who the Board and the Sixth Circuit found was *not* a supervisor. The facts are virtually indistinguishable and they defy an attempt to justify the differing results. We can only ask the Court to read these opinions and see if, in its mind, there is any meaningful difference. We find none.

The differing results do, however, have a common thread. As Judge Van Graafieland noted in *Porta Systems*, that thread is the "results-oriented" approach the Board uses. A finding of supervisory status in *Dadco Fashions* allowed the allegedly coercive statements to be attributed to the employer, thus providing the basis for a bargaining order. By *not* finding supervisory status in the instant case, the Board was able to count the authorization cards solicited by Gregory Stone, find a card majority and enter a bargaining order. The Board's result-oriented approach to supervisory status is clear.

It must come to an end. The NLRB must return to its role as a neutral. Guidance and instruction from this Court is necessary.

CONCLUSION

For the foregoing reasons, Machine Tool and Gear, Inc. prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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